No. 80-332

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. RHODES, et al.,

Petitioners,

v.

KELLY CHAPMAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of the States of Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the Government of the Virgin Islands In Support of Petitioners, Amici Curiae

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INTEREST OF AMICI CURIAE

Amici are states which operate penal institutions within their respective jurisdictions. The prison population in many of these institutions has risen dramatically in recent years. State prisoners have, in turn, sought relief in the federal courts from allegedly overcrowded prison conditions. The lower federal courts have responded by intervening in the administration of state penal institutions on the basis of various

interpretations of the Eighth Amendment. This case presents the first opportunity for the Court to define the contours of the Eighth Amendment and its application in the context of prison condition lawsuits.

SUMMARY OF ARGUMENT

In this case, the district court ordered the State of Ohio to reduce the inmate population at its Southern Ohio Correctional Facility (S.O.C.F.) by 38%. *Chapman v. Rhodes,* 434 F. Supp. 1007, 1022 (S.D. Ohio, 1977). Regardless how such an order is phrased, it necessarily involves the transfer (presumably to newly constructed facilities), or the premature release, of 1,400 convicted felons. *See,* 434 F. Supp. at 1021, 1022. The order dramatically impacts upon the expertise-based action of state correctional authorities, the planning and fiscal prerogatives of the state legislative and executive branches, and the criminal dispositional discretion of the state's judiciary. Such a broad and far reaching compromise of the constitutionally-based principles of federalism, comity and the separation of powers ought not be lightly undertaken by the federal trial courts nor casually reviewed on appeal.[1] Although the federal judiciary must discharge its duty to

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[1] See *Procunier v. Martinez,* 416 U.S. 396, 404-405 (1974):

"'Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficiacy of judicial intervention. Prison administrators are

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protect fundamental constitutional rights from violation in state penal institutions, *see, e.g. Johnson v. Avery,* 393 U.S. 483 (1969), it must also remain appropriately sensitive to constitutional principles of federalism. The standards for determining whether constitutional rights have been violated, therefore, ought to be sufficiently clear and well defined to permit application and enforcement without "intrud-[ing] upon state policy any more than necessary." *White v. Weiser,* 412 U.S. 783, 795 (1973). *Cf. United States v. New Mexico,* 438 U.S. 696 (1977).

The constitutional imperative which underlies the order in this case is the district court's conclusion that the conditions of confinement at S.O.C.F. constituted cruel and unusual punishment in violation of the Eighth Amendment. This conclusion is grounded on the court's finding that, under the "totality of the

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> responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.' "

See also, Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661 (1978); Haas, Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine, 1977 Det. C.L. Rev. 795.

circumstances," those conditions were "shocking to the conscience." 434 F. Supp. at 1019. As the district court itself recognized, "[s]ince the 'totality' of the circumstances differ from case to case, it is difficult to find 'controlling' authority." *Id.* In fact, the standard applied by the district court is so subjective that it virtually insulated the trial court's order from appellate review. The Sixth Circuit was left to conclude that the findings of fact were not "clearly erroneous", that the conclusions of law were "permissible," and that the remedies provided were "reasonable".

The conditions of S.O.C.F. which shocked the District Court's conscience in this case are so inherently unshocking that their recitation sufficiently betrays the Court's error. In addition to the fact that double celling was occurring, due to an inmate population 38% over design capacity, the District Court supported its conclusion with findings that there were not enough jobs to go around, double celling interfered with studying, and psychological and social worker staffs were numerically inadequate. The Court expressly found that food, ventilation, medical and dental care were adequate; staffing was acceptably proportionate; violence was not increased due to double celling; and visitation, plumbing, lighting, and law library facilities were not demonstrably inadequate. In short, notwithstanding its purported consideration of the totality of the circumstances, the Dis-

trict Court found an Eighth Amendment violation and mandated fundamental changes in Ohio's correctional system because a significant number of inmates were double-celled.

Amici submit that the holding of the District Court in this case and the Sixth Circuit's summary affirmance are symptomatic of the imbalance of state-federal power which has resulted from the highly subjective, non-analytic formulae which the lower federal courts have devised for addressing Eighth Amendment claims in the context of prison condition suits. Employing the rubrics of "Evolving Standards of Decency",[2] "Shocking to the Conscience"[3] or "Totality of the Circumstances",[4] the lower courts have produced the anomalous and logically troublesome result that, thus far, prisons in at least 29 jurisdictions have been held to be "unusual". *See* Tucker, The Charles Street Jail Litigation: The Allowable Extent of Federal Judicial Involvement, B.C. Env. Aff. L. Rev. 665 (1979).

These tests have, in effect, converted the minimum standards embodied in the Eighth Amendment into an affirmative jurisdictional base from which federal dis-

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[2] *Battle v. Anderson*, 564 F2d 388 (10th Cir. 1977); *Hite v. Leeke*, 564 F2d 670 (4th Cir. 1977); *Nadeau v. Helgemoe*, 561 F2d 411 (1st Cir. 1977); *Gates v. Collier*, 501 F2d 1291 (5th Cir. 1976); *Sweet v. South Carolina Dept. of Corrections*, 529 F2d 854 (4th Cir. 1975).

[3] *Nadeau v. Helgemoe, supra; Williams v. Edwards*, 547 F2d 1206 (5th Cir. 1977); *Crowe v. Leeke*, 540 F2d 740 (4th Cir. 1976); *French v. Heyne*, 547 F2d 994 (7th Cir. 1976); *Holt v. Sarver*, 442 F2d 304 (8th Cir. 1971); *Sweet v. South Carolina Dept. of Corrections, supra.*

[4] *Crowe v. Leeke, supra; Sweet v. South Carolina Dept. of Corrections, supra; Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194 (8th Cir. 1974).

trict courts can impose apparently unreviewable architectural and penological standards upon the states. The tests are not supported in either the history or language of the Eighth Amendment; nor are they consistent with the decisions of this Court. More importantly, the tests are neither a necessary nor desirable means of protecting constitutional rights.

A more precise, objective, and workable test can and ought to be applied in reviewing prison conditions. Prison conditions should be evaluated in terms of their tendency to cause extreme or unnecessary pain. Such a test, rooted in the history of the amendment and the commonly understood meaning of the term "cruel and unusual", has been articulated and applied by this Court in other contexts.[5] Its application to prison conditions would provide a more objective standard which is more susceptible to meaningful appellate review. It would protect against conditions of confinement which can be reasonably characterized as cruel while restricting the intrusiveness of federal intervention.

ARGUMENT

I

STANDARD FOR EVALUATING PRISON CONDITIONS

A. *Historical Background*

Although the application of the Eighth Amendment must be guided by the "evolving standards of

[5] *See, e.g., Coker v. Georgia,* 433 U.S. 584, 592 (1977); *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) and cases cited infra.

decency that mark the progress of a maturing society", *See Trop v. Dulles,* 356 U.S. 86, 100-01 (1958), identifying the kinds of abuses addressed by the amendment is, fundamentally, an historical question. The circumstances surrounding the adoption of the amendment and its British antecedent indicate that it was intended to address three distinct abuses: the imposition of cruel and unusual *methods* of punishment; the imposition of penalties that are illegal or unauthorized by statute; and the imposition of punishments which are disproportionate to the offense.

A complete account of the debates in the First Congress relating to the adoption of the Eighth Amendment is contained in *Furman v. Georgia,* 408 U.S. 238, 258-63 (1972) [Brennan, J., concurring]. These debates indicate that the framers of the Constitution only intended to proscribe "tortures and other barbarous methods of punishment." *Estelle v. Gamble,* 429 U.S. 97, 102 (1976). There was little debate on the measure when it was adopted. This absence of debate is, no doubt, attributable to the fact that the language of the Amendment was commonplace at the time, having been drawn from the provisions in nine state constitutions which had in turn adopted the language of the English Bill of Rights of 1689 (1 Will. § 2 ch 2) [collected in 8 English Historical Documents, 1660 - 1714, p. 121 (1953)]. The interpretation of the Eighth Amendment as a prohibition

against cruel methods of punishment is primarily derived from the intentions of the American framers, but it may also have been a concern of the framers of the English Bill of Rights.[6]

The prohibition of unauthorized or illegal penalties may be traced to the litany of grievances against James II contained in the English Bill of Rights. Among the grievances are complaints that,

> "[E]xcessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberties of the subjects;

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[6]The immediate impetus for the cruel and unusual punishment provision in the events of 1660-88 is obscure. Traditional theory argues that the provision was a response to the Bloody Assizes of 1685. Current historical theory, influenced by Professor Granucci's article, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839 (1969), argues that the provision was intended as a response to the punishment inflicted on Titus Oates by Lord Chancellor Jeffreys following Oates' conviction for perjury in connection with this testimony in the Popish Plot trials of 1678-79. The theory seems implausible and is almost certainly too narrow an explanation of the reason for the provision.

Oates, following the Revolution of 1688, petitioned the House of Lords for relief from the two judgments and verdict against him, but the petition was rejected. The parliamentary debates do not reflect that the prohibition in the Bill of Rights was intended to remedy Lord Jeffreys' judgment against Oates; and if that had been its understood purpose, it seems unlikely that the House of Lords would have rejected Oates' petition. *See,* 10 Howell, State Trials 1326-1330 (1886); 9 Gray, Debates in the House of Commons 286-94 (1763); Kenyon, The Popish Plot 259-62 (1972).

Torture, other than *piene forte et dure,* was not legal in Seventeenth Century England. 1 Macauley, History of England from the Accession of James II 72 (1856); Ogg, England in the Reigns of James II and William III 244 (1955). The Scottish Claim of Right of 1689, which offers an instructive parallel to the Bill of Rights, complains of the use of "inhuman tortures without any evidence and in ordinary crimes," and declares, "That the using torture without evidence or in ordinary crimes, is contrary to law." The usual explanation for this provision is that it was intended to prohibit the methods of interrogation employed to force William Carsteres to divulge information about the Whiggish Rye House Plot of 1683. Thumbscrews, which were "unusual", having been imported from Muscovy in August of 1684, Id., at 173, had been used on Carsteres and the Scotch Privy Council had threatened to use the boot of pain. See, M'Crie, Scotland's Part and Place in the Revolution of 1688 61-66 (1888). James, during the period following the Rye House Plot, personally presided during tortures conducted in the Scottish Privy Council. Macauley, supra, at 203.

"And excessive fines have been imposed:

"And *illegal* and cruel punishments inflicted;

"And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied;

"*All of which are utterly and directly contrary to the known laws and statutes and freedom of this realm.*" (Emphasis supplied.)

Although the origins of the cruel and unusual punishment provision in the declaration of rights are obscure and "* * * modern historiography has done less than justice to the Bill of Rights." Ogg, *supra,* note 6 at 244, it is nevertheless probable that the cruel and unusual punishment clause embodied ancient rights.[7] The origin of the prohibition against disproportionate. punishment is traceable to such ancient rights. It is traceable to Cap. 20 of the Magna Charta of 1215 provides, in part:

"A freeman shall be amerced for a small offence only according to the degree of the offence; and for a grave offence he shall be amerced according to

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[7] "Except in this article of the dispensing prerogative, we cannot say, on comparing the bill of rights with what is proved to be the law by statutes, or generally esteemed to be such on the authority of our best writers, that it took away any legal power of the crown, or enlarged the limits of popular and parlimentary privilege. The most questionable proposition, though at the same time one of the most important, was that which asserts the illegality of a standing army in time of peace, unless with consent of parliament." 2 Hallam, The Constitutional History of England 318-319 (1880). See also, 1 Stephen, History of the Criminal Law of England 412 (1883):

"[The Bill of Rights] converted many doubtful propositions into law by saying that they were 'ancient rights and liberties' when all that could truly have been said was that it would have been well to act upon that supposition in the past and that for the future the matters stated should be held to be law."

the gravity of the offence, saving his contenement. . . ."

The Magna Charta prohibition against disproportionate amercements had, by 1615, been understood to prohibit disproportionate punishment. *Hodges v. Humkin, Maior of Liskerret,* 80 Eng Rep 1015 (K.B. 1615). By 1621, the amercement clause had been held to prohibit excessive fines. Thompson, Magna Charta 295 (1948).

An "historical interpretation" of the Eighth Amendment, which would limit its application to those torturous methods of punishment which the framers intended to address, has not prevailed. See, *Furman v. Georgia, supra,* at 274-69 (Brennan J., concurring). Rather, this Court has recognized that the Amendment embodies each of the three discrete prohibitions outlined above. As the nature of those prohibitions and their history suggest, each form of claim entails different standards of resolution and each calls for a distinct analytic approach. Thus, determination of the standard for resolution of prison condition claims first requires identification of the Eighth Amendment prohibition involved.

B. *Nature of the Eighth Amendment Claim In Prison Condition Suits*

A complaint that certain prison conditions violate the Eighth Amendment is a complaint that the method of punishment is cruel and unusual and must

be analyzed according to criteria applicable to that type of claim. Although it can be argued that the conditions of imprisonment are disproportionate to a particular offense, disproportionality cannot be the claim in class action law suits involving a wide class of prisoners, some of whom have been convicted for heinous offenses. The claim of disproportionality is, of necessity, an individualized claim that is inappropriate to the structural reform law suit of which this case is a typical example.[8] See, Robbins and Buser, Punitive Conditions of Prison Confinement: An Analysis of *Pugh v. Locke* and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, Stan. L. Rev. 893, 903-04 (1977).[9]

Thus, the generalized nature of class action prison condition claims necessarily precludes analysis and evaluation of the method of punishment in terms of its suitability to the criminal conduct which prompted it. The court is forced to consider the acceptability of the

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[8]Similarly, it cannot be seriously contended that a general prison conditions lawsuit involves a claim of illegal or unauthorized punishment. Although it could be argued that incarceration is "unauthorized" because penal statutes cannot "authorize" cruel and unusual punichment, such a claim is hopelessly circular and depends ultimately on a finding that the method of punishment is cruel.

[9]"Because this [disproportionality] test was developed in cases involving the trial judge's or prison official's discretionary power in imposing specific sanctions, generally increasing those already meted out at sentencing, it is particularly inappropriate in evaluating ongoing conditions of confinement for the general prison population. Challenges to a cumulation of prison conditions that daily affect the inmate community and that do not include the imposition of extra punishments following particular transgressions of prison regulations cannot profitably draw on this essentially transactional theory."

challenged conditions *per se*. If an Eighth Amendment violation is held to exist, the conditions are necessarily deemed to be an unacceptable punishment for any crime.

C. *The Traditional Test and the Concept of Pain*

A claim that certain prison conditions constitute an impermissible method of punishment invokes the concerns of the framers of the Constitution and the core concept of the Amendment.[10] During the first century following the enactment of the Eighth Amendment a complaint that a particular method of punishment was cruel and unusual was the only cognizable type of claim. Consistent with what is known of the framers' intentions, the Ninteenth Century cases only inquired whether punishment inflicted torture or an unacceptable degree of unnecessary pain. It was not until 1910, that this Court held that disproportionate penalties fell within the ambit of the Eighth Amendment prohibition. *Weems v. United States,* 217 U.S. 349 (1910).[11]

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[10] "The primary purpose [of the cruel and unusual punishment] clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed." *Powell v. Texas,* 392 US 514 531-32 (1968).

[11] Of the five cases addressing Eighth Amendment claims prior to *Weems v. United States,* 217 U.S. 349 (1910), three reject claims that the sentence meted out was disproportionate to the offense. *Pervear v. Commonwealth,* 5 Wall. 475 (1867) [fine and imprisonment at hard labor for bootlegging]; *O'Neil v. Vermont,* 144 U.S. 323 (1892) [potential imprisonment at hard labor for 28, 866 days for furnishing liquor]; *Howard v. Fleming,* 191 U.S. 126 (1903) [10 years imprisonment for conspiracy to defraud]. Only

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Even after *Weems,* claims that certain modes of punishment were cruel and unusual have been met with traditional analysis. In *Louisiana ex rel Francis v. Resweber,* 329 U.S. 459 (1974), the petitioner claimed that it was cruel and unusual to sentence him to die by electrocution when a previous attempt had failed. The Court approached the problem with familiar notions drawn from the history and language of the Eighth Amendment:

> "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688.
>
> ". . . . .
>
> "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of

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Wilkerson v. Utah, 99 U.S. 130 (1879) and *In re Kemmler,* 136 U.S. 436 (1890) analyze the issue of whether certain methods of punishment are cruel and unusual. *Wilkerson,* in holding that death by shooting does not violate the Amendment, notes that shooting is a traditional method of execution and stresses that "[I]t is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." 99 U.S., at 136. *In re Kemmler* relies heavily and with approval on the New York courts' discussion and holding that electrocution is not cruel and unusual. That discussion centers on the issue of whether and to what extent electrocution inflicts pain. It concludes that electrocution, as a method of execution, ". . . under such conditions and in the manner contemplated by the Statute, must result in instantaneous, and consequently in painless death." 136 U.S., at 443-44. See the discussion of *Kemmler* in *Louisiana ex rel Francis v. Resweber,* 329 U.S. 459, 475-76 (1974) (Burton, J., dissenting).

cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." *Id.* at 463-64.

In considering method of punishment claims, this Court has always framed its inquiry to determine whether the challenged punishment inflicted an impermissible degree of physical pain. Underlying the inquiry, has been the understanding that the language of the Eighth Amendment was intended to prohibit tortures and other barbarous and inhumane punishments, the gratuitous infliction of extreme pain and suffering. The inquiry has been variously expressed: "unnecessary cruelty," *Wilkerson v. Utah, supra*; "unnecessary pain," *Louisiana ex rel Francis v. Resweber, supra*; "wanton infliction of physical pain," *Furman v. Georgia,* 408 U.S. 238, 392-93 (1972) [Burger, C.J., dissenting]; "unnecessary and wanton infliction of pain," *Gregg v. Georgia,* 428 U.S. 153, 173 (1976); "purposeless and needless imposition of pain and suffering," *Coker v. Georgia,* 433 US 584, 592 (1977); "infliction of such unnecessary suffering [as to be] inconsistent with contemporary standards of decency," *Estelle v. Gamble,* 429 U.S. 97, 103 (1976). Although the method of expression has differed, there has been little doubt as to the actual lineaments of what is intended. This Court has always fixed on pain as the lodestar against which the minimum standard of the Eighth Amendment is measured.

The cases illustrate that the Eighth Amendment does not proscribe all pain. A standard for evaluating methods of punishment must therefore distinguish impermissible methods or conditions in terms of both the quality and quantity of pain involved.

D. *The Degree of Pain: The Meaning of Cruel*

It is clear that the framers of the Eighth Amendment intended to prohibit an evil minded infliction of the excruciating pain associated with torture. *See, Estelle v. Gamble, supra,* 429 U.S. at 102; *Furman v. Georgia, supra,* 408 U.S. at 377 (Burger, C.J., dissenting). The fairest reading of the language of the Amendment would interpret it to prohibit the unnecessary infliction of severe pain. Such a reading is roughly consonant with the intentions of the framers and does not distort the commonly understood meaning of the term "cruel and unusual punishment".

According to dictionary definitions, both "cruel" and "punishment" connote, in different degrees and contexts, pain.[12] Cruel means "disposed to inflict pain . . . pleased by hurting others. . . . Severe, distressing, extremely painful."[13] Punishment means "retri-

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[12]The primary, if now somewhat obsolete, definition of "pain" reveals its association with punishment:

"1. Suffering or loss inflicted for a crime or offense; punishment; penalty; a fine.

"2. A primary condition of sensation or consciousness, the opposite of *pleasure*; the sensation which one feels when hurt (in body or mind); suffering, distress." 7 O.E.D. 377 (1933).

[13]The Oxford English Dictionary defines "cruel", when applied to conditions and circumstances, as "Causing or characterized by great suffering; extremely painful or distressing." 2 O.E.D. 1216 (1933).

butive suffering, pain or loss." Webster's Third New International Dictionary (1976). Thus, according to the ordinary meaning of its language, the Amendment bars the gratuitous infliction of severe pain.[14]

Fixing the degree of pain that is "cruel and unusual" is inevitably a judgment which must be made according to "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra* at 100-101. However, it is plain that the kind of pain prohibited is that which hurts; that which causes one to say "ouch". A minimum requirement for scrutiny under the Eighth Amendment is that the pain inflicted be the kind which hurts in a sharp or acute way. The Eighth Amendment was not intended to and does not prevent mild physical sufferings which may in some sense be "unnecessary". It does not require that the State house prisoners in the Hay-Adams and enroll them at Georgetown because they would otherwise be "unnecessarily" discomfitted. See *Fur-*

[14] Professor Granucci cites Sir James Murray's selection, in the Oxford English Dictionary, of Swift's description of his cold as cruel for the proposition that "[T]he word "cruel" had a less onerous meaning than it has today. In normal usage it simply means severe or hard." *Granucci, supra,* n. 6, at 860. The selection proves only that the word "cruel" has its metaphoric uses. Samuel Johnson, who ordinarily drew on 16th and 17th Century sources, defines cruel as:

"(1) Pleased with hurting others; inhuman; hardhearted; without pity; without compassion; savage; barbarous; unrelenting.

"(2) [Of things.] Bloody; mischievous; destructive; causing pain."

1 Johnson, Dictionary of the English Language [unpaginated] (1755). Even a cursory look at the seventeenth century literature demonstrates that the word 'cruel,' then as now, like most words, derives meaning from context. See, e.g., John Dryden's 1665 play *The Indian Emperour*:

> "If then thou art that cruel god whose eyes Delight in Blood, and Humane Sacrifice," Dryden, The Dramatic Works 284-85 (Summers, ed. 1932).

man v. Georgia, supra, 408 U.S., at 391-93 [Burger, C.J. dissenting].

As the Fifth Circuit has noted:

> "If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight." *Newman v. Alabama,* 559 F.2d 283, 291 (5th Cir. 1977).

Denial of any of the items catalogued in *Newman* causes identifiable, quantifiable, physical pain. Although a judgment as to whether such pain is "cruel and unusual" focuses on one's mental state, it is specific and objectively measurable. It can therefore be subjected to meaningful review and it can be implemented by specific remedies.

It has been suggested, but never squarely held, that the Eighth Amendment prohibits severe mental as well as physical pain. *See, e.g., Furman v. Georgia, supra,* 408 U.S. at 271 (Brennan J., concurring). This suggestion may be consistent with the foregoing analysis so long as the kind of prohibited mental pain is identified. Pain is a sensation and therefore all pain is, in a sense, mental. Regardless of whether it is inflicted by physical or psychological means, pain can be sharp or acute. If the kind of physical pain proscribed by the Eighth Amendment is that which hurts — the sort of pain that is produced by "cruel punishment" — the appropriate psychological analogue is mental pain

that hurts. The paradigm of such mental anguish is the effect of a Chinese water torture. Just as the Eighth Amendment prohibits the unnecessary infliction of the kind of pain that hurts and not the kind of pain that is identified as a dull ache, it also prohibits actual mental anguish but does not prohibit a sense of anxiety.

E. *Application of the Pain Standard To Prison Conditions*

When applied to the context of prison reform litigation, the pain standard is capable of responding to a surprisingly broad range of prison conditions. Amici maintain that the standard is fully adequate to guarantee the basic human requirements which the constitution seeks to protect. Inadequate medical or dental care, long term denial of food or clothing, pestilential squalor, and violence, whether inflicted by guards or other inmates, are all circumstances that cause pain. If such conditions are so severe that they may, according to evolving standards of decency, properly be characterized as cruel, then they are prohibited.

The Eighth Amendment was designed to respond, and does adequately respond, to the kinds of conditions detailed in the Arkansas prison cases.[15] The

[15]The protracted litigation involving the Arkansas prison system is found in the following cases:

Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); *Jackson v. Bishop*, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968);

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prison at Cummins Farm housed an average of four and sometimes as many as 10 or 11 prisoners in 80 square foot cells. This kind of overcrowding, the use of the Tucker telephone, brutal ad hoc punishments, rampant and uncontrolled violence, lack of medical treatment, and an inadequate diet combined with harsh working conditions are individually and collectively conditions to which a traditional reading of the Eighth Amendment is addressed.

In contrast, the complaints by prisoners in this case do not approach the ambit of the Amendment. Being lodged with another person in a 60-foot-square cell is no doubt an inconvenience; it is no doubt uncomfortable, but there is no ordinary sense in which that condition can be labelled cruel. Adding numerically inadequate psychological and social work staff, interference with study, and lack of jobs to the central double celling condition cannot alter the characterization, not just because the Eighth Amendment does not mandate rehabilitative programs and conditions, but because there is nothing about those conditions, taken singly or in the aggregate, that can fairly bear the epithet "cruel." Even assuming that in some sense

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Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd.* 442 F.2d 304 (8th Cir. 1971); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part and reversed in part sub nom Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194 (8th Cir. 1974); *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 743 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

these conditions may be said to inflict pain, it seems obvious that the kind and degree of pain prohibited by the Eighth Amendment is absent.

II

LOWER FEDERAL COURT TESTS

The lower federal courts have not evaluated prison conditions according to these traditional Eighth Amendment standards. They have failed to determine whether, singly or in the aggregate, the challenged conditions cause pain and, if so, whether the pain is so unnecessary and severe that, according to contemporary standards of decency, the conditions can fairly be characterized as cruel. Nor have the courts restricted their remedies to the elimination of impermissibly painful conditions. Rather, beginning with *Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F2d 304 (8th Cir. 1971), they have interpreted the Eighth Amendment as affirmative authority to cure a perceived deep and abiding social ill — inadequate and in some cases deplorable prison conditions. Employing a variety of vague and highly subjective standards, the lower courts have exercised virtually unreviewable discretion to mandate far reaching bureaucratic reform. Those standards have included, most prominently: a "totality of the circumstances" approach to measure prison conditions; a misapplication of the *Trop v. Dulles* dictum to mandate prison conditions that comply with the court's standard of decency; and

a peculiar use of the Due Process "shock the conscience" standard to gauge the propriety of conditions.

A. *Totality of the Circumstances*

Lower federal courts have inquired whether particular prison conditions in the aggregate constitute cruel and unusual punishment. There is nothing inherently fallacious about such an analysis but, in its application, it has become grossly distorted. The approach originated with *Holt v. Sarver, supra,* and was applied to conditions which were so deplorable that no one would seriously argue that the Eighth Amendment was not breached. But, by a series of chiaroscuro renderings, the approach has evolved to its present form:

> "The question is constantly stated as one of ascertaining the 'totality of the circumstances' of the particular case and then inquiring into whether the totality as determined is intolerant (sic) or shocking to the conscience, or barbaric or totally unreasonable in the light of the ever changing modern conscience." *Chapman v. Rhodes,* 434 F Supp 1007 (S.D. Ohio (1977)).

As applied by the lower courts, the standard is deficient in at least three respects.

In the first place, the analysis is holistic; it does not require that any single condition violate the Eighth Amendment for an aggregate violation to be found. An analysis of the totality, including subjective impressions which cannot be recorded, makes it possible for the whole to be greater than the sum of its parts.

Additionally, the application of the standard avoids meaningful analytic or factual review. The more general the statement of the conclusion, the more arduous the tasks of appellate review become. The generalized nature of the totality approach, coupled with the subjectivity of the substantive standard with which the test is always linked,[16] reduced the Sixth Circuit to holding that the "conclusions of law are permissible."

Another notable feature of the "totality" standard is that the failure to identify any particular violation of the Eighth Amendment leads to a generalized intrusion on the functioning of the state bureaucracy. The conclusion that the whole institution is unconstitutional leads to the apparent corollary that the whole institution must be remedied. Rather than identifying individual violations and formulating individual remedies, the court is able, and in some ways impelled by the breadth of the conclusion, to mandate wide and continuing remedies that deeply compromise institutional integrity.[17].

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[16]The substantive standards, notions of decency or shocked conscience, are discussed below.

[17]Robbins and Buser, supra, at 920, make a stronger assertion:

"Yet, because he used the 'totality of conditions' approach, which bases the right to relief on a conglomeration of 11 considerations, Chief Judge Johnson was *forced* into adopting a remedy that responded to all 11 considerations — a remedy that inevitably would be far ranging. It may seem ironic, nonetheless, that inmate-plaintiffs who are unable to make out a constitutional cause of action based on any one prison conditions in effect may receive the same relief as if they had made out and *succeeded* on *11* such claims; it only adds to the irony that such

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Finally, the "totality" approach fails because of its false predicate. The test does not inquire whether the conditions wantonly inflict serious physical or mental pain. It focuses on whether the conditions are "intolerable," or "shocking to the conscience," or "barbaric," or "totally unreasonable in the light of the ever changing modern conscience". These phrases are apparently understood to be synonymous but their meaning is undefined. Clearly, however, they do not quantify pain. Standing alone, they bear no relation to the Eighth Amendment or its underlying principles.

B. *Substantive Standards: Evolving Standards of Decency and The Shocked Conscience*

The "Evolving Standards of Decency" test is derived from Chief Justice Warren's statement, in the plurality opinion in *Trop v. Dulles, supra,* that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-01. The statement is dictum because it formed no part of the dispositive pronouncement. It appears in a discussion of a ground for relief that was joined by only three other members of the Court. The dictum merely states the generally

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inmates also may be entitled to a plethora of remedies that require significantly more intensive and constitutionally less obvious forms of federal court supervision over state agencies than the remedies available under any one such claim would require."

The wider remedy is not, of course, "forced." Judge Johnson could have chosen, for example, to remedy a select group of conditions in order to reduce deleterious conditions to a constitutional minimum.

recognized view that what is "cruel and unusual" will have different specific applications in different historical periods.

In utilizing the statement as a standard against which prison conditions are measured, the lower federal courts have ignored a critical component in the formulation. The courts have omitted cruel and unusual punishment from analysis. The intention of the *Trop* language is to stress that the Eighth Amendment draws its meaning from evolving standards of decency *as to what is cruel and unusual.* The omission has led courts to inquire as to the decency of conditions irrespective of whether those conditions inflict an impermissible degree of unnecessary pain. Courts have interpreted *Trop v. Dulles,* in the prison condition context, to require that the conditions adhere to a generalized standard of decency; and they have declared unconstitutional those conditions which they characterize as indecent.

When the focus is shifted from cruel punishment to the decency of conditions, a wide range of circumstances which would not ordinarily draw Eighth Amendment scrutiny become relevant. Conditions which would not invoke traditional Eighth Amendment analysis, such as deteriorating physical facilities, idleness, a general lack of rehabilitative programs, and double celling, suddenly become important. Applying this "decency" standard, courts have

converted the architectural design capacity of an institution and ideal standards for square footage into constitutional minimums. *See, e.g. Chapman v. Rhodes, supra* 434 F. Supp. at 1020 (design capacity); *Battle v. Anderson,* 447 F. Supp. 516, 525 (ED Okla. 1977) (American Public Health Association Standards). This court has, in the context of pretrial detention, expressly disapproved such a practice:

> "[W]hile the recommendations of these various groups may be instructive in certain cases, they simply do not establish the Constitutional minima; rather, they establish goals recommended by the organization in question." *Bell v. Wolfish,* 441 U.S. 520, 544 n 27 (1977).

The "Shocking to the Conscience" test similarly shifts the focus away from cruel punishment to circumstances which would not otherwise be cognizable. The test is imported from Justice Frankfurter's Due Process analysis in *Rochin v. California,* 342 U.S. 165 (1951). Under the test, a host of activities and conditions that have nothing to do with cruelty or the infliction of pain may be proscribed.

The *Rochin* standard is, like the decency standard, notoriously subjective. Even when it is as carefully applied as it was by Justice Frankfurter, it poses extraordinary problems. *Rochin v. California, supra,* at 175-77 (Black, J., concurring). It involves value judgments that depend on the state of one's conscience; and the state of one's conscience is more likely to be a product of individual economic and social circum-

stances than any identifiable civilizational norm. Under both the shock the conscience and the evolving standards test, meaningful appellate review is all but impossible. Refutation or verification of the conclusion that a given set of conditions is shocking to the conscience or indecent is simply not a task of which the ordinary judicial instruments of logic and language are capable. This is especially true where, as here, the conclusion is applied to a subtle and complex interrelation of social and physical circumstances. Because the conclusion that a given set of conditions is shocking or indecent cannot be reviewed, or analytically approached, the conclusion is essentially discretionary. Thus, lower federal courts are invested with broad discretion to determine whether or not they should exercise the power to reform state prisons. This discretion has, predictably, been exercised in favor of federal intrusion in nearly every instance in which the issue has arisen.

Since 1970, lower federal courts have employed one set of standards when individual Eighth Amendment claims have been advanced and quite another set of standards when structural reform prison condition law suits are at issue. In the prison condition cases, the lower courts have, in diverse ways, infused Eighth Amendment analysis with highly subjective standards for which there is no basis in principle and slender policy justifications.

C. *Remedies*

Federal court reform of state prisons deeply compromises the constitutionally based principles of federalism, comity, and separation of powers. See, Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661 (1978); Haas, Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine, 1977 Det. C.L. Rev. 795. Moreover, considerations of policy that are of less than constitutional magnitude urge a more traditional analysis. The disabilities of the structural reform law suit,[18] the lack of judicial expertise in penology, the decline in prison discipline that attends judicial intervention, and the increased federal dockets that result from encouraged §1983 litigation all weigh against the broad remedies being imposed under the lower federal courts tests.

Amici contend that the specificity and objectivity of the analytical standard which we advocate facilitate the use of less intrusive remedies to address Eighth Amendment violations. Once a federal court

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[18]See, Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Fiss, the Supreme Court 1978 Term — Forward: The Forms of Justice, 93 Harv. L. Rev. 1 (1979); Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978). Of particular concern here is the fact that the class claims are not individualized. A prisoner might prefer double celling to avoid isolation and yet be forced to single cell by decree. The conclusion is made that medical care is inadequate notwithstanding the fact that no single inmate can make out a claim that medical care was improperly denied, i.e., that individual rights were violated under the Eighth Amendment. Additionally, the role of the federal court as trier of fact, manager of the suit, and expounder of law introduces a greater risk of lack of objectivity and provides an opportunity for virtually unreviewable decrees.

identifies and remedies individual prison conditions which cause severe pain, its constitutional function terminates. Deleterious conditions which do not invoke the Eighth Amendment, like double celling and the lack of rehabilitation, can and should be left to be remedied by the political organs to which the constitution assigns the primary responsibility of administration.

Even under the broader standards currently in use, more restrictive remedies can and ought to be utilized.[19] The court in *Chapman* found a violation at S.O.C.F. under the totality of the circumstances and required the state to submit a plan which would, with reasonable dispatch, terminate double celling at the institution. *Chapman v. Rhodes, supra,* 434 F Supp at 1022. As a practical matter, such a plan requires Ohio to either construct a new facility or release prisoners. It is difficult to imagine a more intrusive remedy, or one more damaging to institutional integrity. The release of prisoners inflicts severe damage on the entire criminal justice system. It indiscriminately overrides the exercise of state court sentencing discretion, parole board decisions, and legislative sanctions for the commission of crimes.

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[19] *Rizzo v. Goode,* 423 U.S. 362, 379-80 (1976); *White v. Weiser,* 412 U.S. 783 (1973); *Nagel, supra; Robbins and Buser, supra; Tucker,* The Charles Street Jail Litigation: The Allowable Extent of Federal Judicial Involvement, 7 B.C. Env Aff L Rev 665 (1979). *Cf. United States v. New Mexico,* 438 U S 696 (1977).

A less intrusive alternative is available in this case and in most "totality of the circumstances" cases. Ohio should have been given the opportunity to formulate a plan which would have reduced impermissible conditions to a level that is consistent with constitutional mimimum standards. For example, the state should have been given the opportunity to submit a plan which would allow prisoners more time out of their cells and increase psychological and social work staffing, thereby reducing the conditions to a constitutionally acceptable level and avoiding the institutional distress caused by mandatory release of prisoners.

CONCLUSION

For the reasons stated above, amici urge the adoption of a traditional Eighth Amendment standard for measuring prison conditions. Under the standard, the decision of the Sixth Circuit Court of Appeals should be reversed.

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